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FILED
07/10/2023
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
43B-0621-R-2023
Lambert, Kathryn
3.00

MONTANA WATER COURT, YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN
BASIN 43B
PRELIMINARY DECREE

CLAIMANT: Sara Katherine Howe Revocable Trust

CASE 43B-0621-R-2023

43B 194192-00

43B 194193-00

43B 194194-00

43B 194388-00

43B 194391-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusion of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must mail a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

Claim 43B 194388-00 appeared in the Preliminary Decree with the following issue remark:

THE CLAIMED VOLUME EXCEEDS THE MAXIMUM FEASIBLE VOLUME. BASED ON THE FLOW RATE AND PERIOD OF USE, THE MAXIMUM VOLUME POSSIBLE IS 28.46 ACRE-FEET PER YEAR.

The issue remark was not addressed and resolved during the objection process. The Legislature has directed the Water Court to resolve the issue remarks using the procedures set forth in section 85-2-248, MCA. Under Section 85-2-248(3), MCA, information in the claim file or other information obtained by the Court can be reviewed to determine if it provides a sufficient basis to resolve the issue raised by a remark. In this instance, the information in the claim file is sufficient to address and resolve the issue remark.

For all of these claims, there is another issue which was discovered after issuance of the Preliminary Decree. It was brought to the Court's attention that there may be problems with the Mill Creek claims using Upland Ditch or Mill Creek Flat Ditch. Some of the claims in this Case have Upland Ditch and others have Mill Creek Flat Ditch listed as the ditch name. The issue for each claim was identified in the April 5, 2023 Order Consolidating Case And Setting Filing Deadline.

In order to give the claimant an opportunity to review the volume issue remark and the various Mill Creek Flat Ditch/Upland Ditch issues, an Order Consolidating Case and Setting Filing Deadline was issued on April 5, 2023, setting a May 19, 2023 filing deadline. Nothing was filed. The May 30, 2023 Order Setting Show Cause Deadline states:

As detailed in the Order, it appears

- the volume quantity on claim 43B 194388-00 should be removed and replaced with "THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE"
- the ditch name on claim 43B 194192-00 should be Mill Creek Flat Ditch
- the point of diversion legal description on claim 43B 194193-00 should be changed to the description for Mill Creek Flat Ditch
- the ditch name on claim 43B 194194-00 should be Upland Ditch
- the point of diversion legal description on claim 43B 194388-00 should be changed to the description for Mill Creek Flat Ditch
- the point of diversion legal description on claim 43B 194391-00 should be changed to the description for Mill Creek Flat Ditch

Therefore, it is

ORDERED that the deadline is **June 27, 2023** for the claimant to file a written statement showing cause why the Court should not make the above changes. If not filed by the deadline, the Court will conclude the claimant agrees with these changes and will proceed with changing the claims as detailed

above.

Nothing was filed by the claimant. These documents are viewable in the Court's FullCourt Enterprise case management system.

APPLICABLE LAW

"All issue remarks to claims that are not resolved through the filing of an objection as provided in 85-2-233 must be resolved as provided in this section." Section 85-2-248(2), MCA.

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R.

FINDINGS OF FACT

1. The Preliminary Decree also includes the following remark on each of these claims:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT WERE FILED BY DIFFERENT PARTIES WHO CLAIM OVERLAPPING PLACES OF USE. 43B 37051-05, 43B 194192-00, 43B 194193-00, 43B 194194-00, 43B 194337-00, 43B 194338-00, 43B 194339-00, 43B 194340-00, 43B 194341-00, 43B 194342-00, 43B 194388-00, 43B 194390-00, 43B 194391-00.

This remark provides notice to the claimants if they wish to seek modification of the place of use legal descriptions. If no claimant files an objection to the place of use, no further proceedings are necessary. The place of use/ownership overlap issue remark should be removed as it does not need to be addressed.

2. For claim 43B 194192-00, the Preliminary Decree states that the ditch name is UPLAND DITCH. The ditch name should be MILL CREEK FLAT DITCH.

3. For claim 43B 194193-00, the Preliminary Decree states that the point of diversion legal description is NENENW section 3, T6S, R9E, PARK. The legal description should be the NESWNE section 3, T6S, R9E, PARK.

The Preliminary Decree also includes the following notice remark:

DITCH NAME WAS MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

This remark should be removed as having served its notice purpose.

4. For claim 43B 194194-00, the Preliminary Decree states that the ditch name is MILL CREEK FLAT DITCH. The ditch name should be UPLAND DITCH.

The Preliminary Decree also includes the following notice remark:

DITCH NAME WAS MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

This remark should be removed as having served its notice purpose.

5. For claim 43B 194388-00, the Preliminary Decree states that the volume is 37.67 ACRE-FEET. This quantification should be removed and the following standard remark for direct flow irrigation claims should be added: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE. The volume issue remark should be removed as addressed and resolved.

The Preliminary Decree states that the point of diversion legal description is the NENENW section 3, T6S, R9E, PARK. The legal description should be the NESWNE section 3, T6S, R9E, PARK.

6. For claim 43B 194391-00, the Preliminary Decree states that the point of diversion legal description is the NENENW section 3, T6S, R9E, PARK. The legal description should be the NESWNE section 3, T6S, R9E, PARK.

The Preliminary Decree also includes the following notice remark:

POINT OF DIVERSION WAS MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

This remark should be removed as having served its notice purpose.

CONCLUSIONS OF LAW

1. The information on the Statement of Claim for 43B 194388-00 is sufficient to resolve the issue remark without evidentiary hearing. Sections 85-2-248(3) and (9), MCA.

2. The Statements of Claim and the new DNRC marked aerial photograph are sufficient to contradict and overcome the prima facie claims as incorrectly modified prior to issuance of the Preliminary Decree.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim for each claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW

Service via USPS Mail:

Sara Katherine Howe Revocable Trust
73 Chicory Rd
Livingston, MT 59047

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 194192-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: HOWE SARA KATHERINE REVOCABLE TRUST
73 CHICORY RD
LIVINGSTON, MT 59047 8704

Priority Date: APRIL 1, 1883

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

***Flow Rate:** 29.00 GPM

***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 4 - MODERATELY LOW

***Maximum Acres:** 4.00

Source Name: MILL CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NESWNE	3	6S	9E	PARK

Period of Diversion: APRIL 15 TO OCTOBER 15

Diversion Means: HEADGATE

Ditch Name: MILL CREEK FLAT DITCH

Period of Use: APRIL 15 TO OCTOBER 15

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	4.00		NENWNW	18	5S	9E	PARK
Total:	4.00						

THE PLACE OF USE INCLUDES TRACT 2A OF CERTIFICATE OF SURVEY NO. 580, PARK COUNTY.

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

194192-00 194193-00 194194-00

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 194193-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: HOWE SARA KATHERINE REVOCABLE TRUST
73 CHICORY RD
LIVINGSTON, MT 59047 8704

Priority Date: JUNE 4, 1963

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

***Flow Rate:** 70.00 GPM
THE ACTUAL FLOW RATE IS 0.156 CFS. COMPUTER PROGRAM LIMITATIONS DO NOT ALLOW THE CORRECT FLOW RATE TO BE PRINTED ABOVE.

***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 4 - MODERATELY LOW

***Maximum Acres:** 4.00

Source Name: MILL CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NESWNE	3	6S	9E	PARK

Period of Diversion: MAY 1 TO JULY 15

Diversion Means: HEADGATE

Ditch Name: MILL CREEK FLAT DITCH

Period of Use: MAY 1 TO JULY 15

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	4.00		NENWNW	18	5S	9E	PARK
Total:	4.00						

THE PLACE OF USE INCLUDES TRACT 2A OF CERTIFICATE OF SURVEY NO. 580, PARK COUNTY.

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

194192-00 194193-00 194194-00

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 194194-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: HOWE SARA KATHERINE REVOCABLE TRUST
73 CHICORY RD
LIVINGSTON, MT 59047 8704

Priority Date: JUNE 4, 1963

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

***Flow Rate:** 71.80 GPM

***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 4 - MODERATELY LOW

***Maximum Acres:** 4.00

Source Name: MILL CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NENENW	3	6S	9E	PARK

Period of Diversion: APRIL 15 TO JULY 15

Diversion Means: HEADGATE

Ditch Name: UPLAND DITCH

Period of Use: APRIL 15 TO JULY 15

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	4.00		NENWNW	18	5S	9E	PARK
Total:	4.00						

THE PLACE OF USE INCLUDES TRACT 2A OF CERTIFICATE OF SURVEY NO. 580, PARK COUNTY.

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

194192-00 194193-00 194194-00

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 194388-00 STATEMENT OF CLAIM
Version: 4 -- POST DECREE
Status: ACTIVE

Owners: HOWE SARA KATHERINE REVOCABLE TRUST
73 CHICORY RD
LIVINGSTON, MT 59047 8704

Priority Date: JUNE 4, 1963

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

***Flow Rate:** 70.00 GPM
THE FLOW RATE IS EQUIVALENT TO 0.156 CFS.

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 4 - MODERATELY LOW

***Maximum Acres:** 3.00

Source Name: MILL CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NESWNE	3	6S	9E	PARK

Period of Diversion: APRIL 15 TO JULY 15

Diversion Means: HEADGATE

Ditch Name: MILL CREEK FLAT DITCH

Period of Use: APRIL 15 TO JULY 15

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	3.00		SENWNW	18	5S	9E	PARK
Total:	3.00						

THE PLACE OF USE INCLUDES TRACT 2B CERTIFICATE OF SURVEY NO. 580, PARK COUNTY.

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

194388-00 194390-00 194391-00

AUTHORIZATION TO CHANGE ISSUED 02/24/1989 FOR CHANGE IN POINT OF DIVERSION COMPLETED 11/08/1991. FILE REFLECTS RIGHT AS IT EXISTED PRIOR TO JULY 1973. APPROVED CHANGES WILL BE RECORDED AFTER FINAL DECREE. SEE 43B 194388-00.

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 194391-00 STATEMENT OF CLAIM
Version: 4 -- POST DECREE
Status: ACTIVE

Owners: HOWE SARA KATHERINE REVOCABLE TRUST
73 CHICORY RD
LIVINGSTON, MT 59047 8704

Priority Date: APRIL 1, 1883

Type of Historical Right: DECREED

Purpose (use): IRRIGATION
Irrigation Type: FLOOD

***Flow Rate:** 29.18 GPM
THE FLOW RATE IS EQUIVALENT TO 0.065 CFS.

***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 10.00

Source Name: MILL CREEK
Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NESWNE	3	6S	9E	PARK
Period of Diversion:	APRIL 15 TO OCTOBER 15					
Diversion Means:	HEADGATE					
Ditch Name:	MILL CREEK FLAT DITCH					
Period of Use:	APRIL 15 TO OCTOBER 15					

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	3.00		SENWNW	18	5S	9E	PARK
Total:	3.00						

THE PLACE OF USE INCLUDES TRACT 2B CERTIFICATE OF SURVEY NO. 580, PARK COUNTY.

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

194388-00 194390-00 194391-00

AUTHORIZATION FOR CHANGE ISSUED 02/24/1989 FOR CHANGE IN POINT OF DIVERSION COMPLETED 11/08/1991. FILE REFLECTS RIGHT AS IT EXISTED PRIOR TO JULY 1973. APPROVED CHANGES WILL BE RECORDED AFTER FINAL DECREE. SEE 43B 194388-00